

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 28 June 2022

Public Authority: Mayor's Office for Policing And Crime
Address: 2nd, The Queen's Walk,
London
SE1 2AA

Decision (including any steps ordered)

1. The complainant has requested copies of the application forms for successfully appointed applicants to the position of Legally Qualified Chair (LQC) for Police Conduct Panels for the last 10 years.
2. The Commissioner's decision is that Mayor's Office for Policing And Crime (MOPAC) has correctly cited section 40(2) in response to the request.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 29 June 2021, the complainant wrote to MOPAC and requested information in the following terms:

"I am aware that the actual decision to appoint a chair is posted online but I cannot find posted online any of the actual applications made by persons who were subsequently appointed as a chair and could you please provide copies of those applications for the past 10 year period."
5. MOPAC provided a response on 27 July 2021 confirming it held the requested information. However, it refused to provide it citing sections 21, 22 and 40(2) FOIA as its basis for doing so.
6. Following an internal review MOPAC wrote to the complainant on 2 August 2021 and maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 13 September 2021 to complain about the way his request for information had been handled and stated:

"1. That the request was wrongly treated as an FOI Act request and that it should have been dealt with under the DPA.

2. That the request for a review was based on the fact that MOPAC had not addressed the information request but instead addressed a request I did not make; in particular, they referred to a supposed pre-existing intention to publish LQC biographies on their website which was not an information request I made.

3. MOPAC stated in their initial response (which was maintained in the internal review decision to be correct that:

"Additionally, some of the information contained in LQC application forms may already be published on their firm's websites, linkedIn etc and therefore is already in the public domain - therefore this information is exempt under Section 21 of the FOI Act - information reasonably accessible to the applicant. This is an absolute exemption, therefore no public interest test is required."

Had the FOI Act been appropriate then the statement that section 21 would be applicable is wrong and misguided as it presupposes that I know who they have appointed as LQC's (and they appear not to publicly disclose the names) and also that I would know what information was requested by MOPAC from applicants who went onto be appointed as LQC's [sic]. If the information were therefore reasonably accessible to me then MOPAC would have no problem directing me to it but the reason they have not done so is because they do not even suggest where or how I could try and find the information about persons whose names they will not even disclose or what actual information could possibly be. Clearly if the information was publicly and reasonably accessible then under the FOIA Act they should have provided the requisite advice and assistance where to find it but did not.

4. Had the FOI Act been appropriate then the balancing test was wrongly carried out as it is in the public interest for the public to know whether bodies who appoint LQC are asking the correct questions for applicants to become appointed as an LQC not least whether they are being asked to disclose information which lead (a) to them be disqualified from being appointed and (b) later being removed if appointed and that came to light and (c) whether appointed applicants actually made such a disclosure.

5. It appears that the same person at MOPAC who made the initial decision also made the internal review decision.
8. The Commissioner considers the scope of his investigation to be to determine if MOPAC was correct to cite section 40(2) in response to the request. In doing so he is mindful of a previous decision notice issued on 4 May 2022¹ relating to an identical request to the OPCC for Cambridgeshire and Peterborough from the same complainant.
9. The Commissioner has addressed other issues raised in the 'Other matters' section at the end of this decision notice.

Reasons for decision

Section 40(2) – Third party personal data

10. Section 40(2) provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), asset out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

¹<https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020345/ic-129110-r4l8.pdf>

² As amended by Schedule 19 Paragraph 58(3) DPA

Is the information personal data?

14. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

18. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to specific individuals who were candidates for the posts of LQCs. He is satisfied that the information withheld both relates to and identifies those individuals. The withheld information contains addresses, telephone numbers and email addresses. Additionally, the withheld information contains special category data relating to age, gender, sexual orientation, and disability. There are also free text fields where other special category data is recorded. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

19. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

22. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

Lawful processing: Article 6(1)(f) of the UK GDPR

23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

24. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”³

25. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

26. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

³ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

Legitimate interests

27. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits.
28. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
29. However, the Commissioner acknowledges that the complainant likely has a private legitimate interest, and they consider there is also a wider legitimate public interest in ensuring those appointed as LQCs have the appropriate qualifications and merits to fulfil those duties. Nevertheless, the Commissioner is not persuaded that this is sufficient to outweigh the rights and freedoms of the individuals concerned.

Is disclosure necessary?

30. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
31. The Commissioner considers that the complainant's identified legitimate interests have been met by publication of the blank application form online as referred to in the previous decision notice. This application form contained all the questions asked of the applicants in relation to that part of the recruitment process. The Commissioner considers this is sufficient to address the legitimate interests of transparency and openness by the OPCCs in relation to the complainant's request to see the questions applicants were asked.
32. The Commissioner accepts that information on application forms completed by the candidates includes personal information and views they would not have any expectation of being disclosed and that were part of an application process.
33. The Commissioner notes the legitimate interest in knowing if such information were disclosed on the application forms, however, from the information provided during this investigation, the Commissioner is

satisfied that such information would be disclosed as part of the recruitment process checks undertaken by MOPAC.

34. As the Commissioner has decided in this case that further disclosure is not necessary to meet the legitimate interest, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).
35. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
36. The Commissioner has therefore decided that MOPAC is entitled to withhold the information under section 40(2), by way of section 40(3A)(a) of FOIA.

Other matters

37. Although the Commissioner has found that MOPAC was entitled to rely on section 40(2) to withhold all the requested information, he considers it is appropriate to provide his view of other concerns raised, for the benefit of both parties.

Section 21 – information reasonably accessible by other means

38. Section 21 of the FOIA states that: “(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”
39. The purpose of section 21 is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route.
40. In this case MOPAC stated that some of the information contained in LQC application forms may already be published on their firm’s websites, linkedIn etc. However, as it has not identified any individuals appointed as LQCs it is impossible for any information to be accessible, therefore section 21 is not engaged.
41. The complainant considers that the request was wrongly treated as an FOIA request and that it should have been dealt with under the DPA.
42. The FOIA provides public access to information held by public authorities, whereas the UK General Data Protection Regulation (UK GDPR), tailored by the Data Protection Act 2018 applies to most UK businesses and organisations and affords an individual specific rights relating to how their personal data is used.

43. The UK GDPR provides the following rights for individuals:

- The right to be informed
- The right of access
- The right to rectification
- The right to erasure
- The right to restrict processing
- The right to data portability
- The right to object
- Rights in relation to automated decision making and profiling.

44. It is not within the Commissioner's remit to specify how a public authority arranges who is responsible for dealing with FOI request responses and internal reviews. Ideally two different people would undertake these tasks, however he acknowledges that this is not always possible.

Right of appeal

45. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Duffy
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